(3)

No. 06-850

FILED
FEB 20 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

CINERGY CORPORATION, PSI ENERGY, INC.,
CINCINNATI GAS & ELECRIC CO.,
and CINERGY SERVICES, INC.,

Petitioners,

v.

UNITED STATES, STATE OF NEW YORK,
STATE OF CONNECTICUT, STATE OF NEW JERSEY,
HOOSIER ENVIRONMENTAL COUNCIL,
and OHIO ENVIRONMENTAL COUNCIL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS THE STATES OF NEW YORK, CONNECTICUT, AND NEW JERSEY, HOOSIER ENVIRONMENTAL COUNCIL, AND OHIO ENVIRONMENTAL COUNCIL

ANDREW M. CUOMO
Attorney General of the State of New York
BARBARA D. UNDERWOOD*
Solicitor General
DANIEL SMIRLOCK
Deputy Solicitor General
ANDREW BING
Assistant Solicitor General
120 Broadway
New York, NY 10271
(212) 416-8016

ROBERT ROSENTHAL
J. JARED SNYDER
Assistant Attorneys General

* *Counsel of Record*

Attorneys for Respondents

(*Additional Counsel Listed on Signature Page*)

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES ii

INTRODUCTION 1

ARGUMENT

I. Cinergy Relies Erroneously On A Superseded Regulation In Support Of Its Contention That The NSPS Emissions Test Applies As A Threshold To Determine Whether Its Renovation Projects Constitute PSD "Major Modifications" 3

II. Cinergy's Claim That The Utility Industry Long Understood The PSD Regulations To Provide A Maximum Hourly Emissions Rate Test Is Refuted By The Record 5

CONCLUSION 10

TABLE OF CITED AUTHORITIES

Page

Cases:

Alabama Power Co. v. Costle,
636 F.2d 323 (D.C. Cir. 1979) 4

Alaskan Trojan Partnership v. Gutierrez,
425 F.3d 620 (9th Cir. 2005) 4

Duke Energy Corp. v. Environmental Defense,
411 F.3d 539 (4th Cir. 2005), *cert. granted*, 126 S. Ct. 2019 (2006) ..... *passim*

Environmental Defense Fund, Inc. v. EPA,
898 F.2d 183 (D.C. Cir. 1990) 4

Esco Manufacturer Co., Matter of, v. Pritchard,
50 F.3d 315 (5th Cir. 1995) 4

New York v. EPA, 413 F.3d 3 (D.C. Cir.),
reh'g denied, 431 F.3d 801 (2005) 3

Puerto Rican Cement Puerto Rican Cement Co. v. EPA,
889 F.2d 292 (1st Cir. 1989) 3

United States v. Cinergy,
458 F.3d 705 (7th Cir. 2006) 1, 2, 3

Wisconsin Electric Power Co. v. Reilly ("WEPCo"),
893 F.2d 901 (7th Cir. 1990) 3, 7, 8

Cited Authorities

Page

Federal Statutes:

United States Code ("U.S.C.")

42 U.S.C. § 7411(a)(4) 9
42 U.S.C. § 7475(a)(3) 9
42 U.S.C. § 7479(2)(c) 9
42 U.S.C. § 7607 2

Federal Regulations:

Code of Federal Regulations ("C.F.R.")

40 C.F.R. § 51.166 5
40 C.F.R. § 51.166(b)(2)(i) 1, 4
40 C.F.R. § 51.166(b)(21)(i) 4
40 C.F.R. § 51.166(b)(21)(ii) 4
40 C.F.R. § 52.01 ..... *passim*
40 C.F.R. § 52.01(d) 4, 7
40 C.F.R. § 52.21 5
40 C.F.R. § 52.793 5
40 C.F.R. § 52.884 5
40 C.F.R. § 60.14 1

Cited Authorities

Page

Miscellaneous:

Federal Register

36 Fed. Reg. 15,704 (Aug. 17, 1971) 4
39 Fed. Reg. 42,510 (Dec. 5, 1974) 4
45 Fed. Reg. 52,676 (Aug. 7, 1980) 4, 8
46 Fed. Reg. 9,580/3 (Jan. 29, 1981) 5
57 Fed. Reg. 32,314 (July 21, 1992) 4, 7, 9
61 Fed. Reg. 38, 250 (July 23, 1996) 7

State Regulations

S.C. Code Regs. 61-62.5, Std. 7(a)(2)(ii) 5

INTRODUCTION

The States of New York, New Jersey and Connecticut ("State Respondents") submit this brief in response to the petition for a writ of certiorari of Cinergy Corporation *et al.* ("Cinergy").[1] We agree with petitioners that the decision of the Seventh Circuit below, *United States v. Cinergy*, 458 F.3d 705 (7th Cir. 2006), squarely conflicts with the decision of the Fourth Circuit that is under review in *Environmental Defense, et al. v. Duke Energy Corp.*, No. 05-848 (argued Nov. 1, 2006). Instead of granting certiorari at this time, however, the Court should hold Cinergy's petition in abeyance until *Duke Energy* is decided.

Both cases involve the U.S. Environmental Protection Agency's ("EPA") interpretation of the definition of "major modification" under the 1980 Prevention of Significant Deterioration ("PSD") regulations, 40 C.F.R. § 51.166(b)(2)(i). The Seventh Circuit agreed with EPA and the State Respondents that a "major modification" for purposes of the PSD regulations occurs when a physical change at a polluting facility increases *actual annual* emissions. *See Cinergy*, 458 F.3d at 708-10. In contrast, the Fourth Circuit adopted the utility industry's view that a major modification occurs only if the physical change increases the facility's maximum *hourly* emissions rate.[2] *See Duke Energy Corp. v. Environmental Defense*, 411 F.3d 539, 546-49 (4th Cir. 2005), *cert. granted*, 126 S.Ct. 2019 (2006).

---

1. The State Respondents are joined in this submission by respondents Hoosier Environmental Council and Ohio Environmental Council.

2. In adopting a test based on the maximum hourly emissions rate, the Fourth Circuit utilized the test required under regulations governing a different regulatory program, the New Source Performance Standards ("NSPS"). *See* 40 C.F.R. § 60.14.

In *Duke Energy*, petitioners Environmental Defense, *et al.*, argue two separate grounds for reversing the Fourth Circuit. First, they argue that the Fourth Circuit's decision intruded on the D.C. Circuit's exclusive authority to review final agency actions under the Clean Air Act, 42 U.S.C. § 7607, and thus that the Fourth Circuit lacked jurisdiction to decide the case as it did. *See* Petitioners' Brief in *Environmental Defense v. Duke Energy Corp.*, No. 05-848, at 26-38. Second, they contend that the Fourth Circuit erred on the merits in reading the NSPS hourly emission test into the PSD definition of a "major modification," which requires an increase in *annual* emissions, not *hourly* emissions. *Id.* at 38-50. If the Court reverses the Fourth Circuit's decision on either of these grounds, the conflict between the circuits would no longer exist and Cinergy's petition should be denied. On the other hand, Cinergy's petition should be granted only if the Court rules in favor of *Duke Energy* on both the jurisdictional and merits issues.

In support of its petition here, Cinergy argues that the Fourth Circuit was correct and the Seventh Circuit incorrect on the merits. As explained below, Cinergy is wrong. Indeed, there is a document that was introduced below in *Cinergy* that is not in the *Duke* record, showing that the utility industry fully understood the meaning of the regulations at issue. *See* discussion of Nickel Memorandum, *infra* at 7. Accordingly, the Court should hold Cinergy's petition in abeyance pending its decision in *Duke Energy* and deny the petition if it vacates the Fourth Circuit's decision in *Duke Energy*.

ARGUMENT

I. Cinergy Relies Erroneously On A Superseded Regulation In Support Of Its Contention That The NSPS Emissions Test Applies As A Threshold To Determine Whether Its Renovation Projects Constitute PSD "Major Modifications"

In its petition, Cinergy erroneously asserts that one must first determine whether an NSPS "modification" has occurred before reaching the question of whether a PSD "major modification" has occurred. Petition at 3, 11-12. In support of this proposition, Cinergy relies on 40 C.F.R. § 52.01(d), which defines "modification" as "any physical change in, or change in the method of operation of, a stationary source which increases the emission rate of any pollutant." *See* Petition at 3, 11, 12; *see also* Duke Br., No. 05-848, at 6, 10, 23, 28 (making the same argument).

The Seventh Circuit correctly dismissed this argument as "makeweight." *Cinergy*, 458 F.3d at 711.[3] The term

3. The Seventh Circuit also ruled that EPA's interpretation of the phrase "major modification" as requiring examination of *actual annual* emissions increases is supported by a "natural reading of the regulation." 458 F.3d at 708; *accord New York v. EPA*, 413 F.3d 3, 15-16 (D.C. Cir.) (PSD emissions test measures changes in "actual annual" emissions), *reh'g denied*, 431 F.3d 801 (2005); *Wisconsin Electric Power Co. v. Reilly* ("*WEPCo*"), 893 F.2d 901, 913, 915 (7th Cir. 1990) (regulations for NSPS and PSD programs "measure[] emissions in a fundamentally distinct manner," with NSPS test "concerned primarily with . . . emissions rates, expressed in kilograms per hour" and PSD test "concerned with changes in total annual emissions, expressed in tons per year"); *Puerto Rican Cement Co. v. EPA*, 889 F.2d 292, 296-99 (1st Cir. 1989) (PSD regulations triggered if annual emissions will increase even if plant's hourly rate of emissions will remain same). In *Duke Energy*, without addressing the language of the PSD regulations, the Fourth Circuit held that the PSD regulations "can" be interpreted consistently with the maximum hourly emissions test set forth in NSPS regulations. 411 F.3d at 549 n.7.

"modif[illegible]on" plays no role in defining the separate regulatory term "major modification," which has its own definition predicated on a "physical change or change in the method of operation," 40 C.F.R. § 51.166(b)(2)(i), rather than on a "modification."[4] Even if somehow incorporated into the definition of "major modification" under § 51.166(b)(2)(i), the term "modification" under § 52.01(d) does not help petitioners because it is defined in terms of an unspecified "increase [in] emission rate," not in terms of an hourly emission increase.[5] Under PSD, the applicable "rate" is tons per year. 40 C.F.R. § 51.166(b)(21)(i), (ii). The record shows, moreover, that the regulation relied on by Cinergy (and Duke), § 52.01(d), was replaced and superseded by a 1978 version of the PSD regulations that, in turn, was abandoned in 1980 by promulgation of the PSD regulations at issue here. *See Alabama Power Co. v. Costle*, 636 F.2d 323, 348 n.24 (D.C. Cir. 1979) (referring to § 52.01 as "superseded"); *Env'tl Defense Fund, Inc. v. EPA*, 898 F.2d 183, 184 n.1 (D.C. Cir. 1990) (explaining history of PSD regulations' promulgation).[6]

---

4. *See Alaskan Trojan Partnership v. Gutierrez*, 425 F.3d 620, 631 (9th Cir. 2005) (giving effect to differences in regulatory definitions of "catcher vessels and catcher/processor vessels" because regulations "separately defin[ed] each term"); *Matter of Esco Mfr. Co. v. Pritchard*, 50 F.3d 315 (5th Cir. 1995) (definition of "plan administrator" unhelpful in understanding separately defined term "plan sponsor").

5. As part of its initial PSD regulations, EPA in 1974 interpreted "modification" under § 52.01 to be "consistent with" the NSPS regulatory definition of that term. 39 Fed. Reg. 42,510, 42,513/1 (Dec. 5, 1974). The NSPS definition in effect at that time, however, applied simply to "increases [in] the amount of any air pollutant," with *no* reference to hourly emission rates. *See* 36 Fed. Reg. 15,704, 15,705/1 (Aug. 17, 1971); *see also Duke Energy*, 411 F.3d at 542.

6. That EPA makes no mention of § 52.01(d) in the preambles to its 1980 and 1992 PSD regulations at issue here is further evidence of the irrelevance of that provision. *See* 45 Fed. Reg. 52,676 (Aug. 7, 1980); 57 Fed. Reg. 32,314 (July 21, 1992).

Even if the § 52.01(d) definition of "modification" is to be grafted onto the governing definition of "major modification," an affirmance in *Duke Energy* would not necessarily require the reversal of the Seventh Circuit's decision at issue here because the governing PSD requirements in any given state are determined by that state's implementation plan ("SIP"), rather than the federal regulations. In Ohio and Indiana, the states where Cinergy's plants at issue are located, the PSD regulations that were approved by EPA, *see* 40 C.F.R. §§ 52.793, 52.884, do not include the § 52.01 definition. Instead, only the definition of "major modification" under 40 C.F.R. § 52.21 (which is identical, in relevant part, to § 51.166) was incorporated into those states' SIPs and is applicable here. *See* 46 Fed. Reg. 9,580/3, 9583/3 (Jan. 29, 1981).[7]

II. Cinergy's Claim That The Utility Industry Long Understood The PSD Regulations To Provide A Maximum Hourly Emissions Rate Test Is Refuted By The Record

Cinergy also premises its Petition on the unsupported claim that "at the time these projects occurred, no one at Cinergy believed that they triggered NSR." Pet. at 4; *see also* Duke Br. in No. 05-848 at 16-19. Cinergy's contention echoes Duke's claim at oral argument that:

> [I]t is very clear that the understanding of *everyone in the industry* . . . from 1980, candidly well beyond

7. In contrast, Duke's counsel appeared to argue that South Carolina's PSD regulations do incorporate the § 52.01 definition, Transcript of Oral Argument in No. 05-848, at 27-28, although counsel did not cite to the record in support of this proposition. In fact, the PSD preconstruction requirements under South Carolina's regulations, which were approved by EPA, are applicable only to "the major modification of any existing major stationary source." *See* S.C. Code Regs. 61-62.5, Std. 7(a)(2)(ii). The term "modification" is not separately defined in South Carolina's PSD regulations.

> 1988 all the way up to 1999, was that the regulations didn't apply under any circumstances in the absence of an increase the capacity . . . [a]nd you had to demonstrate that there would be an increase in the hourly rate of emissions.

See Transcript of Oral Argument in No. 05-848 at 25-26 (emphasis added).

This contention is contradicted by a multitude of historical documents, showing that industry long understood the 1980 PSD regulations the same way EPA does. In a 1981 brief filed in their original challenge to the 1980 PSD regulations, for example, industry petitioners interpreted the regulations in the same manner as EPA does here, stating that (i) the regulations "provide that a modification occurs whenever a series of contemporaneous changes at a source result in a significant increase in *actual* emissions, even though the source's net *capacity* to emit remains constant or declines," and (ii) the "question of whether there is a net increase in actual emissions requires that variations in the source's hours and rates of operation be taken into account." *See* Brief for Industry Petitioners in *Chemical Mfg. Ass'n v. EPA*, No. 79-1112 (D.C. Cir.), dated Feb. 12, 1981, pp. 5-6, 28-29 (filed with Court in *Duke Energy*). A settlement agreement entered into by EPA and industrial polluters, including Cinergy and Duke, to resolve that regulatory challenge required EPA to *propose* changing the PSD emissions test to allow emissions increases to be based on a "source's potential to emit (as calculated in terms of pounds of pollutant emitted per hour)." *See* Exhibit B to Settlement Agreement, executed on Feb. 22, 1982, in *Chemical Mfg. Ass'n v. EPA*, No. 79-1112 (D.C. Cir.), at p. 1. This proposal

would have been unnecessary had the PSD regulations already provided an hourly potential emissions test.[8]

Moreover, additional documents show that the utility industry long understood EPA's assertion that the PSD and NSPS emissions tests are separate and different. For example, a publicly-available document prepared by a utility industry representative establishes that industry fully understood that the § 52.01 definition of "modification" is inapplicable to PSD. In a July 29, 1988 memorandum, Henry V. Nickel – counsel for the Utility Air Regulatory Group ("UARG") and Duke's co-counsel in *Duke Energy* – acknowledges that § 52.01(d) is irrelevant to PSD applicability: "[I]n adding the more specific 'major modification' definition to § 52.21, EPA made clear that it, and not the general definition in 40 C.F.R. § 52.01(d), applies to the PSD program." *See* Dist. Ct. Doc. No. 587, Ex. 8, at 38 n. 77.[9]

---

8. At various times since 1981, EPA considered industry's proposal to change the PSD emission test to one based on increases in maximum hourly emissions, but ultimately rejected that approach in 1996. *See, e.g.*, 61 Fed. Reg. 38, 250, 38,269/2 (July 23, 1996) (rejecting adoption of maximum hourly emissions test based on concern that such a test would allow a source "owner to use the [operating unit] at much higher levels (*e.g.*, more hours per day or week) than it had in the past" and thus "increase [] utilization even though hourly potential emissions remain the same").

9. The Nickel memorandum was attached initially to a letter written by the Wisconsin Electric Power Company ("WEPCO") to EPA in the context of EPA's determination that WEPCO's life extension projects constituted "major modifications" and triggered the PSD pre-construction requirements. *See Wisconsin Electric Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1990). The memorandum was also included as part of the publicly available rulemaking docket associated with EPA's 1992 PSD regulations, 57 Fed. Reg. 32,314 (July 21, 1992). In the district court below, plaintiffs here filed the memorandum under seal as part of their Motion for Partial Summary Judgment on the Legal Standard for the Routine Maintenance, Repair and Replacement Exclusion, dated Sept. 12, 2005. Because the document is publicly available, it should not have been filed under seal.

Consistent with this position, UARG recognized, in a June 5, 1989 letter to the Department of Energy, that EPA requires PSD review even for physical changes that "will not increase the [hourly] emission rate of the units." Dist. Ct. Doc. No. 295, Ex. 38, at 8-9. *See also* UARG *Amicus Brief* in *WEPCo*, dated May 22, 1989 (Dist. Ct. Doc. No. 295, Ex. 28, at 9) (acknowledging that EPA reads PSD requirements to "apply even where the project merely improved the availability and reliability of the facility, and was not needed to restore lost capacity"). These admissions, like the others in the *Duke Energy* record discussed in the briefs of petitioners in that case,[10] cannot be reconciled with Cinergy's litigation position in this case.

The utility industry's understanding that the PSD requirements apply to projects that do not increase hourly emissions rates is consistent with repeated statements by EPA over the last two decades that the PSD regulations *do not* include or incorporate an NSPS-like maximum hourly rate test. In adopting the 1980 PSD regulations, EPA specified that a source could increase hours of operation "to take advantage of favorable market conditions" without triggering PSD but not if such increase was associated with "construction activity." 45 Fed. Reg. at 52,704/2; *see also WEPCo*, 893 F.2d at 916 n.11 (same). In adopting changes to its PSD regulations in 1992, EPA again explained that the different emissions tests under the PSD and NSPS regulations "reflect[] the fundamental distinctions between the technology-based provisions of NSPS and the air quality-

---

10. For example, a 1991 Duke compliance manual states flatly that PSD is based on increases in "annual emissions" and can be triggered if a project causes a unit to be "operated more frequently." *See* United States Reply Br. in No. 05-848 at 14, n. 11.

based provisions of NSR." 57 Fed. Reg. at 32,316/1.[11] Making no mention of § 52.01(d), EPA reiterated that an "increase in emissions attributable to an increase in hours of operation or production rate which is the result of a construction-related activity is not excluded from review." *Id.* at 32, 328/1.[12] Accordingly, the claim made by Cinergy (and by Duke) that the electric utility industry did not understand the PSD regulations to mandate an actual annual emissions test is unsupported by the factual record.

---

11. The PSD provisions, properly construed, provide assurance that industrial facilities will not, by expanding operations and thus emissions, undermine the states' efforts to prevent air quality from deteriorating. In furtherance of this goal, the PSD regulations consider real-world pollution impacts of refurbishment projects on air quality: if a unit actually pollutes more as a result of a project, the unit must install pollution controls. The maximum hourly emissions test that Cinergy (and Duke) urges would have the opposite effect. It would allow power plant renovation projects that are intended to increase the number of hours a facility may operate, with consequent increases in annual emissions, to evade review under a statute that is intended to address "any physical change" that may cause deterioration of air quality. 42 U.S.C. §§ 7411(a)(4), 7475(a)(3), 7479(2)(C).

12. Similarly, the record in this case includes a September 9, 1988 applicability determination regarding the WEPCO Life Extension Project in which EPA made clear that, for PSD purposes, "[t]he fact that [a] project is intended to restore the plant's original design capacity is irrelevant to" calculating emissions increases and that "increase[s] [in] production rate or hours of operation [that] are inextricably intertwined with the physical changes" may be considered in such a calculation. Appellants' Supp. App. 292-93.

CONCLUSION

Accordingly, the Court should hold Cinergy's petition in abeyance pending a decision in *Duke Energy*, No. 05-848.

Respectfully submitted,

ANDREW M. CUOMO
Attorney General of the State of New York
BARBARA D. UNDERWOOD*
Solicitor General
DANIEL SMIRLOCK
Deputy Solicitor General
ANDREW D. BING
Assistant Solicitor General
120 Broadway
New York, NY 10271
(212) 416-8016

ROBERT ROSENTHAL
J. JARED SNYDER
Assistant Attorneys General

* *Counsel of Record*

STUART RABNER
Attorney General of the
State of New Jersey
MAURICE A. GRIFFIN
Deputy Attorney General
R.J. Hughes Justice Complex
25 Market Place, P.O. Box 080
Trenton, NJ 08625
(609) 292-6945

RICHARD BLUMENTHAL
Attorney General of the
State of Connecticut
KIMBERLY P. MASSICOTTE
CARMEL MOTHERWAY
Assistant Attorneys General
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120
(860) 808-5250

JONATHAN F. LEWIS
Attorney for Hoosier
Environmental Council and
Ohio Environmental Council
CLEAN AIR TASK FORCE
ATTORNEY FOR CITIZENS GROUPS
18 Tremont Street, Suite 530
Boston, MA 02108
(617) 624-0234

Attorneys for Respondents